

2013

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Recommended Citation

Talicska, Joshua D. (2013) "Jurisdictional Game Changer or Narrow Holding? Discussing the Potential Effects of *Stern v. Marshall* and Offering a Roadmap Through the Milieu," *Seton Hall Circuit Review*: Vol. 9: Iss. 2, Article 2.
Available at: http://scholarship.shu.edu/circuit_review/vol9/iss2/2

Jurisdictional Game Changer or Narrow Holding?

Discussing the Potential Effects of *Stern v. Marshall* and Offering a Roadmap Through the Milieu

Joshua D. Talicska¹

Abstract

In *Stern v. Marshall*, the Supreme Court held that although the bankruptcy courts had statutory authority to issue final and binding decisions on counterclaims based entirely in state law, the bankruptcy courts—as non-Article III tribunals—lacked constitutional authority to do so. While the Court stated that its ruling was narrow, the decision’s reasoning has resulted in a great deal of uncertainty regarding the authority of bankruptcy courts to issue final decisions on matters that do not directly stem from the bankruptcy process. Bankruptcy judges across the country are thus struggling to define the bounds of bankruptcy court authority and jurisdiction. Recognizing this uncertainty, this article provides a multi-step inquiry to assist bankruptcy judges and practitioners in deciding whether an issue is capable of being adjudicated in a non-Article III tribunal post-*Stern*.

I. Introduction

There is an oft-quoted saying: “May you live in interesting times.”² Those connected to bankruptcy practice are thus truly fortunate, for as Robert C. Goodrich and Madison L. Martin maintain: “[I]nteresting times are guaranteed for bankruptcy practitioners and judges as long as bankruptcy appeals continue to make their way to the . . . Supreme Court.”³ Of course, given that the term “interesting” is generally intended, at least in this context, to mean either “turbulent” or “dangerous,” the above was written mostly tongue-in-cheek.⁴

But admitting such flippancy is not intended to detract from the poignant observations of Goodrich and Martin. In fact, the recent Supreme Court decision *Stern v. Marshall* illustrates well the notion that “interesting times” are guaranteed for those connected to bankruptcy

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² See *In re Kogler*, 368 B.R. 785, 786 (Bankr. W.D. Wis. 2007); see also *id.* at 786 n.1 (explaining that “[e]fforts to verify the source of this [saying] . . . have generally proved futile,” but that “[o]ne of its first verified appearances was in a 1966 speech by Robert Kennedy . . .”).

³ Robert C. Goodrich, Jr. & Madison L. Martin, *Money in the Till*, STITES & HARBISON PLLC (Oct. 2004), <http://www.stites.com/news/128/money-in-the-till>.

⁴ See *In re Kogler*, 368 B.R. at 786 n.1.

practice, so long as bankruptcy cases continue to make their way to the Supreme Court.⁵ In brief, the *Stern* Court held that “Bankruptcy Court[s] . . . lack[] the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.”⁶ And although the Court stated that its ruling was “narrow” and limited to “one isolated respect,”⁷ the decision’s logic has “prompted a wave of challenges to the authority of bankruptcy courts to issue final decisions on matters that do not directly stem from the bankruptcy process.”⁸ As one bankruptcy judge lamented:

[B]ombshell does fairly describe *Stern*’s impact [on the bankruptcy system] . . . Everyday I am presented with . . . orders that Congress expects me to either sign as final or forward on with a report and recommendation. . . . [P]rior to *Stern*, I [had] a standard—28 U.S.C. § 157(b)(2)—to serve as my guide. But now I am told that that standard is unreliable when tested against the Constitution itself. My frustration with *Stern* is that it offers virtually no insight as to how to recalibrate the core/non-core dichotomy so that I can . . . proceed with at least some assurance that I will not be making the same constitutional blunder with respect to some other aspect of Authority Section 157(b)(2).⁹

Some commenters and bankruptcy judges agree with this characterization of *Stern*, claiming that the decision signals a “serious threat” to the current bankruptcy system.¹⁰ Other commenters and judges disagree, claiming instead that the opinion “is replete with language . . . that the ruling

⁵ 131 S. Ct. 2594 (2011).

⁶ *Id.* at 2620.

⁷ *Id.*

⁸ Seven Rivera, *Bankruptcy Litigation: The Far-Reaching Impact of Stern v. Marshall*, CHADBOURNE & PARKE LLP, 7 (Oct. 13, 2011), <http://media.traffordpub.com/products/bankruptcy-litigation-far-reaching-impact-of-stern-v-marshall-2011-10-13/presentation.pdf>.

⁹ Meoli v. Huntington Nat’l Bank (*In re Teleservices Grp., Inc.*), 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011).

¹⁰ MARK S. SCARBERRY ET AL., BUSINESS REORGANIZATION IN BANKRUPTCY: CASES AND MATERIALS 91 (4th ed. 2012); see also *In re BearingPoint, Inc.*, 453 B.R. 486, 488 (Bankr. S.D.N.Y. 2011) (modifying a confirmed plan of reorganization requiring trustee to bring suit against directors and officers of Bearingpoint in the bankruptcy court because, subsequent to *Stern*, it was unclear whether the court had jurisdiction to hear such proceedings); Musich v. Graham (*In re Graham*), 455 B.R. 227, 232 n.27 (Bankr. D. Colo. 2011) (explaining that *Stern* “put[s] into doubt this Court’s ability and authority to rule on [an affirmative defense issue] because it emanates from an interpretation of Colorado civil tort law and criminal law,” but sidestepping the complication); Corwin v. Gorilla Cos. (*In re Gorilla Cos.*), No. CV-10-01029-PHX-DGC, 2010 U.S. Dist. LEXIS 76962, at *3–4 (D. Ariz. July 5, 2010) (allowing rehearing after entering judgment because *Stern* effected a “sufficient” change in the law).

should be limited to the unique circumstances of that case.”¹¹ Whatever the intended import of *Stern*, the decision has engendered a great deal of uncertainty as to the constitutionally permissible bounds of bankruptcy court jurisdiction. For instance, some courts have held that *Stern* limits the ability of bankruptcy tribunals to enter final judgments on fraudulent transfer claims.¹² Others disagree.¹³ Courts have similarly split on whether parties are capable of consenting to bankruptcy court jurisdiction.¹⁴ Recognizing this uncertainty, this article provides a multi-step inquiry that is intended to assist judges and practitioners in determining whether a matter is still capable of being adjudicated in a non-Article III tribunal post-*Stern*.

II. History of the Bankruptcy System in the United States

Before examining *Stern v. Marshall* and its potential impact on the American bankruptcy system, a review of that system—from its historical roots to present-day—is needed. For without first understanding the development of the American bankruptcy system and the pre-*Stern* state of affairs, it would be impossible to fully comprehend and appreciate the potential implications of *Stern* on the current bankruptcy system.

1. American Bankruptcy Law Prior to 1978 Amendments

¹¹ *In re Salander O'Reilly Galleries*, 453 B.R. 106, 115 (Bankr. S.D.N.Y. 2011), *aff'd*, 475 B.R. 9 (S.D.N.Y. 2012); *see also* *Brook v. Ford Motor Credit Co. (In re Peacock)*, 455 B.R. 810, 812 (Bankr. M.D. Fla. 2011) (explaining that *Stern* is “limited to precisely those facts”); *Springel v. Prosser (In re Innovative Commc'n Corp.)*, Bankr. No. 07–30012, Adv. No. 08–3004, 2011 WL 3439291 (Bankr. D.V.I. Aug. 5, 2011).

¹² *See, e.g., Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 570 (9th Cir. 2012) (finding that bankruptcy courts cannot enter final judgment on fraudulent transfer claims); *Rosenberg v. Harvey A. Bookstein*, 479 B.R. 584, 587–89 (D. Nev. 2012) (same).

¹³ *See, e.g., Onkyo Eur. Elecs. GMBH v. Global Technovations Inc. (In re Global Technovations Inc.)*, 694 F.3d 705, 722 (6th Cir. 2012) (finding that bankruptcy courts can enter final judgment on fraudulent transfer claims); *KHI Liquidation Trust v. Wisenbaker Builder Servs., Inc. (In re Kimball Hill, Inc.)*, 480 B.R. 894, 906–08 (Bankr. N.D. Ill. 2012) (same); *Cifelli v. Blue Star Residential, LLC (In re Miles)*, 477 B.R. 266, 269–70 (Bankr. N.D. Ga. 2012) (same).

¹⁴ *See Arkison*, 702 F.3d at 567–70 (finding that, although the bankruptcy court lacked jurisdiction over the trustee’s fraudulent transfer claim as a constitutional matter, because the litigant impliedly consented to the bankruptcy court entering final judgment on the matter, the matter could be adjudicated by the non-Article III court). *But see Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012) (finding that the consent of a litigant is ineffectual when the bankruptcy court lacks constitutional authority to enter a final judgment on the matter, because the constitutional grant of authority is a non-waivable “structural principle of Article III”), *cert. denied*, No 12-933, 2013 WL 317425 (U.S. Mar. 18, 2013).

“The Bankruptcy Clause, empowering Congress to ‘pass uniform laws on the subject of bankruptcies,’ was added late in the proceedings of the Constitutional Convention [of 1787], after very little debate.”¹⁵ As explained by James Madison: “The power of establishing uniform laws of bankruptcy [was] so intimately connected with the regulation of commerce . . . that the expediency of [the clause] seem[ed] not likely to be drawn into question.”¹⁶ Although plenary in its power,¹⁷ Congress did not enact “permanent federal bankruptcy legislation” until more than a century after the Convention.¹⁸ Consequently, from 1789–1898, bankruptcy law was largely the province of state regulation.¹⁹

But all that changed with the passage of the Bankruptcy Act of 1898, which marked the beginning of an era of pervasive federal bankruptcy legislation.²⁰ The Act was primarily directed at “facilitating the . . . efficient administration and distribution of the debtor’s property to creditors,”²¹ and few provisions of the Act were directed at providing relief to the debtor.²² Under the 1898 Act, the federal district courts presided over matters of bankruptcy, but most of the judicial and administrative matters were handled by non-Article III adjuncts—individuals termed “bankruptcy referees”—appointed by the federal district courts.²³ Interestingly, enactment of the Bankruptcy Act of 1898 appears to have ignited “[c]ongressional infatuation with bankruptcy law,” and the twentieth century consequently witnessed an “unending parade of

¹⁵ Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995) (giving a lengthy exposé on the history of the American bankruptcy system).

¹⁶ THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., 1999).

¹⁷ *See* *Kalb v. Feuerstein*, 308 U.S. 433, 438–39 (1940) (stating same).

¹⁸ Tabb, *supra* note 15, at 13–15.

¹⁹ *See id.* at 13–23 (detailing the evolution of American bankruptcy law during the 18th and 19th centuries).

²⁰ *Id.* at 23.

²¹ *Id.* at 25.

²² *Id.*

²³ *Id.*

bankruptcy legislation.”²⁴ In brief, the Bankruptcy Act of 1898 remained in effect for eighty years and was amended multiple times.²⁵

2. *The Bankruptcy Reform Act of 1978*

The Bankruptcy Reform Act of 1978 was the first comprehensive overhaul of the 1898 Act.²⁶ The reform process lasted just under a decade.²⁷ The process began in 1968 with Senator Burdick presiding over hearings before a subcommittee of the Senate Judiciary Committee to ascertain whether a bankruptcy review commission should be created, and the hearings ultimately resulted in the formation of the Commission on the Bankruptcy Laws of the United States.²⁸ Congress charged the commission with studying, analyzing, evaluating, and recommending changes to the 1898 Act so that, once implemented, the reformed Act would be better able to “meet the demands of present technical, financial, and commercial activities [in the United States].”²⁹ After nearly a decade of study and debate, President Jimmy Carter signed the Bankruptcy Reform Act of 1978 into law.³⁰

One major weakness of the 1898 Act was its “splintered jurisdictional scheme.”³¹ Under the 1898 Act, the bankruptcy courts had jurisdiction over only “certain core matters,”³² while the state courts retained concurrent jurisdiction over many “bankruptcy-related issues.”³³ As explained by Professor Charles Tabb: “[I]itigation over which court had jurisdiction was frequent

²⁴ Tabb, *supra* note 15, at 26.

²⁵ *Id.* at 23. A detailed examination of the Bankruptcy Act of 1898 and its amendments is beyond the scope of this article. For a detailed discussion of the 1898 Act and its amendments, *see id.* at 23–33.

²⁶ *Id.* at 32.

²⁷ *See id.* at 32–34 (detailing passage of the 1978 Act).

²⁸ *Id.* at 32.

²⁹ *Id.* at 33.

³⁰ Tabb, *supra* note 15, at 34.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 25.

[in those days].”³⁴ Thus, a major feature of the 1978 Act was the “substantial enlargement of bankruptcy court jurisdiction . . . enabling bankruptcy judges to hear virtually any matter arising in, or related to the bankruptcy case.”³⁵ However, the 1978 Act retained the bankruptcy referees—renamed bankruptcy judges in 1973—as non-Article III adjuncts to the federal district courts.³⁶

While it was widely agreed that the decision to expand the jurisdiction of the bankruptcy courts in the 1978 Act was a “substantial improvement” over the 1898 Act,³⁷ that choice—when coupled with the decision to retain the bankruptcy judges as non-Article III adjuncts to the federal district courts—later “proved improvident” when the Supreme Court found that the Act of 1978 impermissibly conferred “broad adjudicatory powers” on non-Article III tribunals in violation of the United States Constitution.³⁸

3. *The Northern Pipeline Decision*

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,³⁹ the Supreme Court found that the broad grant of jurisdiction to bankruptcy courts in the 1978 Act violated Article III of the United States Constitution by:

[I]mpermissibly remov[ing] most, if not all, of the essential attributes of the judicial power from the Art[icle] III district court[s], and . . . vest[ing] those attributes in a non-Art[icle] III adjunct. . . . [This] grant of jurisdiction . . . cannot be sustained as an exercise of Congress’ power to create adjuncts to Article III courts.⁴⁰

³⁴ *Id.*

³⁵ *Id.* at 34.

³⁶ Tabb, *supra* note 15, at 34. The alternative was to make bankruptcy judges Article III judges in their own right. *Id.*

³⁷ *Id.*

³⁸ See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 62 (1982); see also Tabb, *supra* note 15, at 38 (“In *Marathon*, the Court held that the broad grant of jurisdiction to bankruptcy courts in the 1978 Act violated Article III of the Constitution by vesting non-Article III bankruptcy judges with too much of the ‘judicial power’ of the United States.”).

³⁹ 458 U.S. 50.

⁴⁰ *Id.* at 87 (internal quotation marks omitted).

The Supreme Court “further held that the unconstitutional portion of the jurisdictional grant could not be severed from the constitutional portion.”⁴¹ The Court accordingly condemned the entire bankruptcy system, thereby forcing Congress to reorganize the jurisdictional scheme.⁴² Congress responded—several years later—with the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”).⁴³

To remedy the constitutional concerns raised by the Supreme Court in its *Northern Pipeline* decision, the jurisdictional scheme established by Congress in the BAFJA authorized bankruptcy judges to “hear and determine” all cases arising under Title 11 and “all core proceedings” related thereto,⁴⁴ but prohibited bankruptcy judges from determining non-core proceedings.⁴⁵ Rather, the BAFJA commands that bankruptcy judges, when presiding over non-core proceedings, are to submit proposed findings of fact and conclusions of law to the federal district courts and, after considering those proposed findings and reviewing *de novo* those matters to which parties have timely and specifically objected, the district judge is to enter a final order of judgment.⁴⁶ The BAFJA thus established a bifurcated jurisdictional scheme.⁴⁷ This

⁴¹ Tabb, *supra* note 15, at 38

⁴² See *Northern Pipeline Constr. Co.*, 458 U.S. at 88 n.40 (“As part of a comprehensive restructuring of the bankruptcy laws, Congress . . . vested jurisdiction over . . . all matters related to [bankruptcy] cases . . . in a single non-Article III court In these circumstances, we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provisions and adjudicatory structure intact with respect to other types of claims Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. Nor can we assume, as THE CHIEF JUSTICE suggests, that Congress’ choice would be to have these cases routed to the United States district court of which the bankruptcy court is an adjunct. We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art[icle] III”).

⁴³ Tabb, *supra* note 15, at 39.

⁴⁴ 28 U.S.C. § 157(b)(1) (2011).

⁴⁵ *Id.* § 157(c)(1).

⁴⁶ *Id.* While 28 U.S.C. § 157(b)(2) provides examples of “core proceedings,” bankruptcy judges ultimately retain the discretion to determine whether a matter must be referred to the district court. See *id.* § 157(b)(3); see also Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 FORDHAM L. REV. 721, 795–96 (1994) (explaining what constitutes a “core proceeding,” and further explaining that “it is the bankruptcy court, [and] not the district court, which initially determines whether a proceeding is ‘core’ or not”).

bifurcated scheme was believed to remedy the constitutional concerns raised by the Court in *Northern Pipeline*—at least until the recent Supreme Court opinion of *Stern v. Marshall*.⁴⁸

4. *The Stern v. Marshall Decision*

Stern v. Marshall “involved a creditor, Pierce Marshall, who filed a ‘proof of claim’ in the bankruptcy case of Vickie Lynn Marshall—otherwise known as Anna Nicole Smith—arising out of her allegedly defamatory remarks regarding Pierce.”⁴⁹ Vickie Lynn “then filed a counterclaim against Pierce for his alleged tortious interference with her expectancy of a gift” from her late-husband, and Pierce Marshall’s father, J. Howard Marshall II.⁵⁰ In brief, Vickie Lynn alleged that Pierce had “fraudulently induced J. Howard to sign a living trust that did not include her, even though J. Howard meant to give her half his property.”⁵¹ Of course, given the bifurcated jurisdictional structure created by the BAFJA, the question arose:

Was [Vickie Lynn Marshall’s] counterclaim a matter on which the bankruptcy court could—on the one hand—enter final judgment, as a core [proceeding], or—on the other—only enter proposed findings and conclusions, subject to *de novo* review in the district court, as a non-core [proceeding]? As it turned out, hundreds of millions of dollars turned on that question.⁵²

And this is why.

The bankruptcy court ruled against Pierce Marshall on his defamation claim, and in favor of Vickie Lynn Marshall on her counterclaim.⁵³ The court later awarded Vickie Lynn some \$400

⁴⁷ Tabb, *supra* note 15, at 39.

⁴⁸ See, e.g., Robert J. Shapiro, *Bankruptcy Jurisdiction Under the 1984 Amendments: One Step Backward, One Step Forward*, 3 BANKR. DEV. J. 127, 128 (1986) (stating the BAFJA was thought “to remedy the constitutional defects brought to the fore in *Northern Pipeline*”).

⁴⁹ Craig Goldblatt, *Implications of and Lessons From Stern v. Marshall*, THOMSON REUTERS, 1 (Sept. 16, 2011), http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2011/10_-_October/goldblattonsternvmarshall.pdf

⁵⁰ *Id.*

⁵¹ *Stern v. Marshall*, 131 S. Ct. 2594, 2601 (2011).

⁵² Goldblatt, *supra* note 49, at 2.

⁵³ *Stern*, 131 S. Ct. at 2601.

million in compensatory damages and another \$25 million in punitive damages.⁵⁴ On appeal to the district court, Pierce Marshall argued that Vickie Lynn’s counterclaim was not a “core proceeding” under 28 U.S.C. § 157(b)(2)(C), and, therefore, that the bankruptcy court lacked the necessary jurisdiction to hear and decide Vickie Lynn’s counterclaim.⁵⁵ Although the district court disagreed with Pierce, finding that Vickie Lynn’s counterclaim fell within the “literal language” of 28 U.S.C. § 157(b)(2)(C), the court also recognized—citing *Northern Pipeline*—that “it would be unconstitutional to hold that . . . all counterclaims are core” despite the literal language of the Code.⁵⁶ The district court thus reasoned that a “counterclaim should not be characterized as core when it is only somewhat related to the claim against which it is asserted, and when the unique characteristics and context of the counterclaim place it outside the normal type of set-off or other counterclaims that customarily arise.”⁵⁷ Applying this rationale, the district court concluded that Vickie Lynn’s counterclaim was not core, and that the court was required to treat the bankruptcy court’s judgment for Vickie Lynn as proposed rather than final.⁵⁸ After an independent review of the record, the district court similarly found that Pierce had tortuously interfered with Vickie Lynn’s expectation of a gift from J. Howard Marshall II and awarded her roughly \$100 million.⁵⁹

But in the period between the bankruptcy court’s ruling in favor of Vickie Lynn and the district court’s affirmance of that ruling, a probate court in Texas found in favor of Pierce on essentially the same claim—that is, the court ruled that J. Howard Marshall II did not intend to give Vicki Lynn a gift or bequest from his estate or the relevant trust, and that Vickie Lynn was

⁵⁴ *Id.*

⁵⁵ *Id.* at 2601–02.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2602 (internal quotation marks omitted).

⁵⁸ *Id.*

⁵⁹ *Stern*, 131 S. Ct. at 2602.

accordingly not entitled to any distribution from the Estate of J. Howard Marshall II by virtue of any agreement.⁶⁰ This presented a problem for Vickie Lynn. As subsequently explained by Craig Goldblatt, co-counsel to the Marshall estate in the Supreme Court:

[I]f the bankruptcy court’s ruling was a “judgment” [on a core matter], the Texas state court should have given preclusive effect to the bankruptcy court’s prior judgment. [But] if the matter was non-core, so that the bankruptcy court’s decision [was] better understood as proposed findings [of fact] and conclusions [of law], the [federal] district court should have given preclusive effect to the Texas state court’s prior judgment, and Vickie [Lynn] would be entitled to recover nothing.⁶¹

Hundreds of millions of dollars thus turned on whether Vickie Lynn’s counterclaim was a “core” or “non-core” proceeding.⁶² After an appeal to the Ninth Circuit,⁶³ the Supreme Court granted *certiorari* to resolve two issues: whether the bankruptcy court had statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on Vickie Lynn’s counterclaim; and, if so, whether conferring such authority on the bankruptcy court was constitutional.⁶⁴

The Supreme Court began its analysis by explaining that a “counterclaim[] [filed] by the estate against [a] person filing [a] claim[] against the estate” is a “core proceeding” under the plain language of § 157(b)(2)(C).⁶⁵ The bankruptcy court thus had express statutory authority to

⁶⁰ Goldblatt, *supra* note 49, at 2; *see also* Marshall v. Marshall (*In re* Marshall), 392 F.3d 1118, 1129–30 (9th Cir. 2004) (explaining the final judgment of the Texas probate court), *rev’d*, 547 U.S. 293 (2006).

⁶¹ Goldblatt, *supra* note 49, at 2.

⁶² *See id.*

⁶³ Because the Ninth Circuit did not discuss whether Vickie Lynn’s counterclaim was a “core” or “non-core” proceeding, a detailed discussion of that opinion and its logic go beyond the scope of this article, which primarily focuses on offering bankruptcy practitioners and judges guidance on how to determine whether a claim, post-*Stern*, remains a “core” proceeding within the jurisdiction of the bankruptcy courts. Nevertheless, in the interest of comprehensiveness, a brief summary of the appeal to the Ninth Circuit is as follows. Citing the probate exception to federal jurisdiction, which is a self-imposed doctrine barring the federal courts from probating wills or administering estates, Pierce Marshall argued that the federal courts lacked jurisdiction over the subject matter of the dispute. In agreeing with Pierce and finding that the probate exception applied, the Ninth Circuit vacated the district court’s judgment in favor of Vickie Lynn and directed the bankruptcy court to dismiss Vickie Lynn’s claims against Pierce. *Marshall*, 392 F.3d at 1137–38. Although this had the same effect as finding that Vickie Lynn’s counterclaim was a “non-core” proceeding, the Ninth Circuit effectively sidestepped the question.

⁶⁴ *Stern*, 131 S. Ct. at 2600.

⁶⁵ *Id.* at 2604.

issue a final judgment on Vickie Lynn’s counterclaim.⁶⁶ As to the second issue—whether conferring such authority on the bankruptcy court was constitutional—the Court explained that “[a]lthough we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter [a] final judgment on Vickie’s counterclaim, Article III of the Constitution does not.”⁶⁷

In brief, a sharply divided Court held “that the bankruptcy court lacked the constitutional authority to decide [Vickie Lynn’s] state law counterclaim to the extent that it was not resolved in the process of ruling on [Pierce Marshall’s] proof of claim.”⁶⁸ Given that the bankruptcy court lacked the authority to enter a judgment on the counterclaim, “the Texas state court judgment in favor of . . . Pierce Marshall was entitled to preclusive effect.”⁶⁹ Consequently, the estate of J. Howard Marshall III owed Vickie Lynn nothing.⁷⁰

But “[o]ther than ending a protracted and high-profile legal dispute,”⁷¹ is there reason to believe that *Stern* presents a serious threat to the current bankruptcy system as established by the BAFJA? Some academics think so.⁷² In fact, *Stern*’s reasoning has prompted numerous challenges to the authority of bankruptcy courts to issue final orders on those matters that do not directly stem from the bankruptcy process.⁷³

⁶⁶ *Id.* at 2605 (“We agree with Vickie that § 157(b)(2)(C) permits the bankruptcy court to enter a final judgment on her tortious interference counterclaim.”).

⁶⁷ *Id.* at 2608.

⁶⁸ Donald S. Bernstein et al., *Client Letter—Stern v. Marshall: Supreme Court Limits Power of Bankruptcy Courts to Hear Certain State Law Claims Brought by Debtors Against Creditors*, DAVIS POLK & WARDWELL LLP, 1 (June 27, 2011), <http://www.davispolk.com/files/Publication/15802312>; *see also Stern*, 131 S. Ct. at 2620 (“The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.”).

⁶⁹ Goldblatt, *supra* note 49, at 2.

⁷⁰ *Id.*

⁷¹ Adam Lewis et al., *Client Alert—Stern v. Marshall: A Jurisdictional Game Changer?*, MORRISON FOERSTER, 1 (July 6, 2011), <http://www.mofo.com/files/Uploads/Images/110706-Stern-v-Marshall.pdf>.

⁷² *See, e.g., SCARBERRY ET AL., supra* note 10, at 91 (explaining that *Stern v. Marshall* presents a “serious threat” to the current bankruptcy system).

⁷³ *See Rivera, supra* note 8, at 7.

For example, in *Parks v. Consumer Law Associates, LLC (In re Lewis)*,⁷⁴ the United States Bankruptcy Court for the District of Kansas held—after the defendants renewed their motion to withdraw the reference and transfer the action to the District of Kansas in light of *Stern*—that it did not have the authority to enter a final judgment on the trustee’s disgorgement of fees claim or her claim for violation of the Kansas Consumer Protection Act (KCPA).⁷⁵ Although recognizing that the case differed from *Stern* in “many ways,” the bankruptcy court ultimately concluded that because such “claims involve the adjudication of ‘private rights’ and are not intrinsic to the bankruptcy process,” it would be improper for a non-Article III tribunal to enter final judgment on such matters.⁷⁶ Accordingly, the defendants’ motion to withdraw the reference and transfer the action to the district court was granted.⁷⁷

Similarly, in *Samson v. Blixseth (In re Blixseth)*,⁷⁸ a Chapter 7 trustee sought to avoid an allegedly fraudulent transfer under the Bankruptcy Code and California law.⁷⁹ The defendant filed a motion to dismiss the trustee’s fraudulent transfer claim on the basis that the bankruptcy court lacked jurisdiction over the claim.⁸⁰ The United States Bankruptcy Court for the District of Montana granted the motion, reasoning that *Stern* requires fraudulent transfer claims to be decided in federal district court.⁸¹ And citing *Stern*, the Ninth Circuit, in a recent decision,

⁷⁴ Case No. 10-10117, Adv. No. 10-5098, 2012 Bankr. LEXIS 1312 (Bankr. D. Kan. Mar. 29, 2012).

⁷⁵ *See id.* at *5–6.

⁷⁶ *Id.* at *6.

⁷⁷ *Id.* at *12.

⁷⁸ Bankr. No. 09-60452-7, Adv. No. 10-00088, 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011).

⁷⁹ *Id.* at *2.

⁸⁰ *Id.*

⁸¹ *Id.* at *11–12 (“Since Trustee’s fraudulent conveyance claim is essentially a common law claim attempting to augment the estate, does not stem from the bankruptcy itself and would not be resolved in the claims allowance process, it is a private right that must be adjudicated by an Article III court. This Court’s jurisdiction over that claim as a core proceeding is therefore unconstitutional.”).

similarly agreed with an appellant that fraudulent conveyance claims must be decided by Article III tribunals.⁸²

But is *Stern v. Marshall* really a “jurisdictional game changer” with grave consequences, or merely a “narrow ruling that fails as a practical matter to meaningfully change the extent of [the] bankruptcy court[s’] power?”⁸³ Commentators largely agree that the impact of *Stern* will depend on how the lower courts—both bankruptcy and appellate—interpret the opinion.⁸⁴ Thus, attempting to predict *Stern*’s potential impact(s) on the American bankruptcy system requires an examination of recent lower court opinions. Indeed, only by examining recent opinions construing *Stern* will we be able to understand and predict the likely impact(s) of *Stern* on creditors, debtors, bankruptcy courts and practitioners.

III. The Implications of *Stern v. Marshall*

Since *Stern v. Marshall*, judges across the country have struggled to define the bounds of bankruptcy court authority and jurisdiction.⁸⁵ As the Honorable Jeffery R. Hughes lamented:

[Although] *Stern* is careful to limit its holding . . . those who labor in the [bankruptcy] fields can[not] wait until the next fistfight between an expectant heir and his stepmom finds its way to the Court. . . . *Stern* certainly reaffirms that only an Article III judge can enter a judgment associated with the estate’s recovery of contract and tort claims

⁸² See *Executive Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency, Inc.*), 702 F.3d 553, 562 (9th Cir. 2012). *But see* *Onkyo Eur. Elecs. GMBH v. Global Technovations Inc.* (*In re Global Technovations Inc.*), 694 F.3d 705, 722 (6th Cir. 2012) (finding that the bankruptcy court had authority to enter final judgment on a fraudulent transfer claim).

⁸³ Lewis et al., *supra* note 71, at 1.

⁸⁴ See, e.g., *id.* at 1 (“[W]e conclude that although there are equally sound arguments on both sides, the answer to this question depends largely on . . . [the] potential actions [of] courts in the future.”); Kyle J. Ortiz, *The Stern Files*, BANKR. BLOG (Aug. 23, 2011), <http://business-finance-restructuring.weil.com/jurisdiction/the-stern-files/#axzz1pZjKiQ8s> (explaining that “[a]s soon as the *Stern* opinion was released, the question on the minds of bankruptcy professionals everywhere was how [the opinion] would affect the bankruptcy practice,” and concluding that “[t]he answer . . . will be determined largely by how the lower courts interpret the . . . Court’s ruling.”).

⁸⁵ See Eric J. Fromme & Caroline Djang, *Stern v. Marshall Bankruptcy Case: Bombshell or Dud?*, L.A. DAILY J., Oct. 25, 2011, available at <http://www.rutan.com/Publication/PublicationAttachment/a691bc66-aa11-4ab7-9231-f03f7ceb1f0f/Djang%20and%20Fromme%20two%20part%20%20DJ.pdf> (explaining that “bankruptcy courts around the country . . . have expressed frustration with the ‘cloud of uncertainty’ relating to the bankruptcy court’s authority to enter final judgments.”); Madlyn G. Primoff & Seth J. Kleinman, *Stern v. Marshall: What the United States Supreme Court Has to Say About Bankruptcy Court Jurisdiction*, KAYE SCHOLER LLP, 2 (Sept. 21, 2011), http://www.kayescholer.com/news/publications/201109211/_res/id=sa_File1/NYLJStern_v_Marshall21Sept11.pdf.

designed to augment the estate. . . . But *Stern* is silent as to how much further this constitutional protection extends into the bankruptcy process.⁸⁶

Consequently, until the U.S. Courts of Appeal begin to provide much-needed clarity on the limits of the opinion, the impact of *Stern* will depend entirely on how the bankruptcy courts interpret the decision.⁸⁷ Although the bankruptcy courts have only just begun to wrestle with the implications of *Stern*, certain trends are emerging.⁸⁸

First, bankruptcy courts tend to interpret *Stern* narrowly, “reflect[ing] an obvious tension between [the] courts’ natural desire to preserve their authority and their deference to constitutional constraints.”⁸⁹ Second, the general trend is to proceed cautiously, often requiring additional briefing as to *Stern*’s implications before issuing a judgment, lest the court overstep its constitutional authority.⁹⁰ Finally, bankruptcy courts (and recently, the Ninth and Fifth Circuits) generally agree that parties are able to consent to jurisdiction.⁹¹

1. Interpreting Stern Narrowly

Despite initial concerns regarding the potentially broad implications of *Stern*, most courts have interpreted the opinion narrowly.⁹² After all, as the Honorable Cecelia Morris observed, “*Stern* is replete with language emphasizing that the [opinion] should be limited to the unique

⁸⁶ *Meoli v. Huntington Nat’l Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011).

⁸⁷ See *supra* note 84 and accompanying text.

⁸⁸ Adam Lewis et al., *Judicial Restraint in the Early Days Following Stern v. Marshall*, BLOOMBERG LAW REP., Nov. 29, 2011, at 1, available at <http://www.mofo.com/files/Uploads/Images/111129-Judicial-Restrain-in-the-Early-Days-Following-Stern-v-Marshall.pdf>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*; see *Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 567–70 (9th Cir. 2012); see also *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 404–07 (5th Cir. 2012) (analyzing the impact of *Stern* to determine whether federal magistrates retain the authority to enter final judgments on state-law counterclaims when parties consent to trial and entry of judgment by a federal magistrate judge, and concluding that they do). But see *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012) (finding that parties cannot consent to final adjudication when the bankruptcy court lacks constitutional authority to decide the matter), *cert. denied*, No 12-933, 2013 WL 317425 (U.S. Mar. 18, 2013).

⁹² Lewis et al., *supra* note 88, at 1.

circumstances of that case.”⁹³ Accordingly, most bankruptcy courts have held that *Stern* does not limit their ability to enter final judgments on fraudulent transfer or conveyance claims;⁹⁴ turnover proceedings;⁹⁵ proceedings for relief from an automatic stay;⁹⁶ proceedings for approval of a settlement;⁹⁷ and many other claims.⁹⁸

While a minority of courts have interpreted *Stern* more broadly, holding that bankruptcy courts lack the constitutional authority to enter final judgments on avoidance actions, fraudulent transfer claims, and preference actions,⁹⁹ these broad interpretations “appear[] to be the exception rather than the rule.”¹⁰⁰ And although “some litigants have argued that the mere presence of state-law issues in a bankruptcy proceeding limits the bankruptcy court’s [authority] to issue a final judgment, [most] courts have declined to apply such a broad principle.”¹⁰¹

⁹³ *In re Salander O’Reilly Galleries*, 453 B.R. 106, 115 (Bankr. S.D.N.Y. 2011), *aff’d*, 475 B.R. 9 (S.D.N.Y. 2012); *see also In re Crescent Res., LLC*, 457 B.R. 506, 510 n.2 (Bankr. W.D. Tex. 2011) (stating that the *Stern* opinion “should be applied narrowly” and, consequently, that “*Stern* does not apply to this case”) (emphasis added).

⁹⁴ *See, e.g., KHI Liquidation Trust v. Wisenbaker Builder Servs., Inc. (In re Kimball Hill, Inc.)*, 480 B.R. 894, 906–08 (Bankr. N.D. Ill. 2012); *Cifelli v. Blue Star Residential, LLC (In re Miles)*, 477 B.R. 266, 269–70 (Bankr. N.D. Ga. 2012); Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (*In re Appalachian Fuels, LLC*), 472 B.R. 731, 741 (E.D. Ky. 2012); *Kelley v. JPMorgan Chase & Co.*, 464 B.R. 854, 861–63 (D. Minn. 2011); *Springel v. Prosser (In re Innovative Commc’n Corp.)*, Bankr. No. 07–30012, Adv. No. 08–3004, 2011 WL 3439291 (Bankr. D.V.I. Aug. 5, 2011); *see also Onkyo Eur. Elecs. GMBH v. Global Technovations Inc. (In re Global Technovations Inc.)*, 694 F.3d 705, 722 (6th Cir. 2012) (finding that bankruptcy courts can enter final judgment on fraudulent transfer claims). *But see Arkison*, 702 F.3d at 570 (holding that bankruptcy courts cannot decide fraudulent transfer claims); *Rosenberg v. Harvey A. Bookstein*, 479 B.R. 584, 587–89 (D. Nev. 2012) (same).

⁹⁵ *See, e.g., Shaia v. Taylor (In re Connelly)*, 476 B.R. 223, 235 (Bankr. E.D. Va. 2012) (explaining that *Stern* does not affect the ability of the court to enter judgment on a turnover proceeding); *Badami v. Sears (In re AFY, Inc.)*, 461 B.R. 541, 548 (B.A.P. 8th Cir. 2012) (affirming bankruptcy court’s determination that it had jurisdiction over the turnover proceeding).

⁹⁶ *See, e.g., In re Salander O’Reilly Galleries*, 453 B.R. at 117.

⁹⁷ *See, e.g., In re Ambac Fin. Grp., Inc.*, 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011) (“Whatever *Stern v. Marshall* may ultimately be held to mean, this Court is confident that, as a matter of law and practice, it most certainly does not stand for the proposition that the bankruptcy court cannot approve the compromise and settlement of a claim which is indisputably property of a debtor’s estate.”).

⁹⁸ *See Fromme & Djang, supra note 85*, at 2 (explaining that bankruptcy courts have held that they retain the authority to enter final judgments on equitable subordination claims; debtors’ counterclaims that must be resolved by ruling on a creditor’s claim; trustees’ breach of fiduciary duty or common law fraud claims; complaints to determine the nondischargeability of debt and objections thereto; and many others).

⁹⁹ *Lewis et al., supra note 88*, at 2; *see also Rosenberg*, 479 B.R. at 587–89.

¹⁰⁰ *Lewis et al., supra note 88*, at 1.

¹⁰¹ *Id.* at 2 (citing, for example, *In re Salander O’Reilly Galleries*, 453 B.R. at 115).

Rather, the clear trend among bankruptcy courts is to interpret *Stern* narrowly by reasoning that it applies only to counterclaims like Vickie Lynn's that fall under 28 U.S.C. § 157(b)(2)(C).¹⁰²

2. Proceeding with Caution

Even if *Stern* ultimately proves limited in application, the decision has already engendered a great deal of uncertainty among bankruptcy judges regarding their authority to enter final judgments.¹⁰³ Bankruptcy courts have thus tended to proceed cautiously by:

[R]equiring parties to submit additional briefing[s] addressing *Stern*'s implications; [or by] issuing [alternative] judgment[s] that . . . comport[] with [the] different outcomes of the *Stern* analysis; or [] out of an abundance of caution, submitting only proposed findings of facts and conclusions of law to the district court rather than entering [a] final judgment.¹⁰⁴

Regardless of the approach, the bankruptcy courts' message is clear: "bankruptcy judges are likely to proceed cautiously when confronted with questions regarding their constitutional authority to enter final judgments."¹⁰⁵ This paper will now briefly discuss each of these approaches in turn.

a. Specific Briefing

Although Chief Justice Roberts asserted that the *Stern* decision "[did] not change all that much,"¹⁰⁶ the Honorable James M. Peck recently observed that a "cloud of uncertainty" currently envelopes the bankruptcy courts and the bounds of the courts' jurisdiction, thus compelling many bankruptcy judges to request that the parties brief the court as to *Stern*'s impact before entering a

¹⁰² See, e.g., *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 719 (Bankr. M.D. Fla. 2011) ("This Court agrees with the *Stern* Court that the decision in *Stern* 'does not change all that much.'" (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011))); *In re Salander O'Reilly Galleries*, 453 B.R. at 115 (limiting *Stern* to the "unique circumstances of that case"); *Brook v. Ford Motor Credit Co. (In re Peacock)*, 455 B.R. 810, 812 (Bankr. M.D. Fla. 2011) (explaining that *Stern* is "limited to precisely those facts").

¹⁰³ Lewis et al., *supra* note 88, at 2.

¹⁰⁴ *Id.*

¹⁰⁵ Michael Klein & Ronald R. Sussman, *Stern v. Marshall: Ruling That Didn't 'Change All That Much' Changes Everything*, J. CORP. RENEWAL, Oct. 23, 2011, available at <http://www.turnaround.org/Publications/Articles.aspx?objectID=13658>.

¹⁰⁶ *Stern*, 131 S. Ct. at 2620.

final judgment, lest the judge inadvertently overstep the constitutional limitations on the court's jurisdiction.¹⁰⁷ For example, *In re Boricich* involved a plaintiff who asserted five counts against a debtor in a related Chapter 7 bankruptcy case.¹⁰⁸ The fifth count was asserted derivatively and sought a determination that the debt was non-dischargeable under § 523(a)(4) due to the debtor's fraud and defalcation in a fiduciary capacity.¹⁰⁹ The Honorable Jack B. Schmetterer explained that, prior to *Stern*, and under applicable Seventh Circuit precedent, bankruptcy judges had been allowed to determine non-dischargeability claims and enter a dollar judgment on those findings.¹¹⁰ However, in light of *Stern*, Judge Schmetterer declined to enter a dollar judgment until both parties submitted supplemental "briefs discussing *Stern* and demonstrating that [the bankruptcy court retained the] Constitutional authority to enter . . . a money judgment."¹¹¹

Supplemental briefs similarly were requested in *In re DBSI, Inc.*,¹¹² *In re Lehman Brothers Holdings, Inc.*,¹¹³ and *In re Bellingham Insurance Agency*.¹¹⁴ Such requests illustrate the tendency of some bankruptcy judges "to vet *Stern* issues methodically and carefully" before entering a final judgment on the matter.¹¹⁵

b. Alternative Rulings

¹⁰⁷ See *infra* notes 108–13 and accompanying text.

¹⁰⁸ *Dragisic v. Boricich (In re Boricich)*, Bankr. No. 08 B 15248, Adv. No. 08 A 00728, 2011 WL 2600692, at *1 (Bankr. N.D. Ill. June 29, 2011).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *9 (citing *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496, 1508 (7th Cir. 1991)).

¹¹¹ *Id.*

¹¹² *Federal Ins. Co. v. DBSI, Inc. (In re DBSI, Inc.)*, Bankr. No. 08–12687 (PJW), Adv. No. 09–52031 (PJW), 2011 WL 3022177, at *6 (Bankr. D. Del. July 22, 2011) (requesting that both parties submit "written submissions on whether *Stern v. Marshall* permits [the bankruptcy judge] to issue" defendant's partial summary judgment motion).

¹¹³ Adv. Proc. No. 10-03266 (Bankr. S.D.N.Y. Aug. 15, 2011), available at <http://www.burbageweddell.com/2011/08/18/nysb-1-10-03266-93/> (explaining that "[i]n a telephonic chambers conference held on June 29, 2011, the Court asked counsel for Lehman Brothers . . . the Official Committee of Unsecured Creditors of Lehman Brothers . . . and JPMorgan to submit papers addressing the effect of *Stern* on the claims asserted in the above captioned adversary proceeding").

¹¹⁴ *Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 661 F.3d 476, 476 (9th Cir. 2011) (explaining that the bankruptcy judge requested that the parties submit supplemental briefs discussing whether *Stern v. Marshall* "prohibit[ed] bankruptcy courts from entering . . . binding judgment on an action to avoid a fraudulent conveyance").

¹¹⁵ *Lewis et al.*, *supra* note 88, at 2.

Another trend among bankruptcy judges is to enter final judgments *and* propose rulings “in the alternative,” in an effort to address the uncertainty engendered by the *Stern* opinion.¹¹⁶

For example, a number of courts have held:

[I]n the event that [the] district court later finds that the bankruptcy court lacked [the] constitutional authority to render [a] final judgment [on the matter], the bankruptcy court’s decision should constitute a report and recommendation to the district court in accordance with 28 U.S.C. § 157(c)(1).¹¹⁷

This precise approach was taken by the Honorable Judith Fitzgerald in *Springel v. Prosser (In re Innovative Communication Corp.)*.¹¹⁸ In *Springel*, the Trustee of the bankruptcy estate of Innovative Communication Corporation sought to both avoid and recover prepetition fraudulent conveyances and unauthorized post-petition transfers.¹¹⁹ The court found in favor of the Trustee on the claims and, after determining that *Stern* did not limit the bankruptcy court’s ability to enter a final judgment, issued an order for the Trustee.¹²⁰ However, recognizing the uncertainty engendered by *Stern v. Marshall*, the Honorable Judith Fitzgerald held—in the alternative—that:

Assuming, *arguendo*, that the District Court disagrees and reads [*Stern*] broadly to conclude that . . . the opinion limits this court’s jurisdiction [over the Trustee’s claims] to making a Report and Recommendation, this Memorandum Opinion . . . constitutes our Report and Recommendation to the District Court.¹²¹

Similar approaches were taken in *Tibble v. Wells Fargo Bank, N.A. (In re Hudson)*¹²² and *In re Heller Ehrman LLP*.¹²³ Consequently, even when bankruptcy judges believe that *Stern* is

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Springel v. Prosser (In re Innovative Commc’n Corp.)*, Bankr. No. 07–30012, Adv. No. 08–3004, 2011 WL 3439291, at *1 (Bankr. D.V.I. Aug. 5, 2011).

¹¹⁹ *Id.*

¹²⁰ *Id.* at *51.

¹²¹ *Id.* at *3.

¹²² 455 B.R. 648, 657 (Bankr. W.D. Mich. 2011) (“The court will enter a final order. If this court’s order is appealed, and the district court decides this court is not constitutionally authorized to issue a final order in this . . . proceeding, this Opinion should be treated as a report and recommendation.”).

¹²³ *Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, Bankr. No. 08–32514DM, Adv. No. 10–3203DM, 2011 WL 4542512, at *3 (Bankr. N.D. Cal. Sept. 28, 2011) (explaining that “any findings of fact I make at trial should be treated as proposed if the district court concludes that I lacked authority actually to enter those findings.”).

inapplicable to the matters before them, judges' recognition of the uncertainty engendered by the opinion and the undesirability of being overruled has resulted in at least some judges issuing alternative rulings as a means of "preserving their decisions."¹²⁴

c. "Over-Abundance of Caution"

Other bankruptcy judges have proceeded extremely cautiously, choosing to submit only proposed findings of fact and conclusions of law "even while acknowledging that *Stern's* impact on the case at issue is unclear."¹²⁵ This was the approach taken by the Honorable Brian K. Tester in *In re Medical Educational and Health Services, Inc.*¹²⁶ Debtor-plaintiff Medical Educational and Health Services, Inc. asserted, *inter alia*, various state law claims against the defendants.¹²⁷ After reviewing *Stern* in some detail, the Honorable Brian K. Tester concluded that it was unclear whether the decision precluded him from issuing a judgment on the debtor-plaintiff's state law claims.¹²⁸ Accordingly, the judge observed:

[*Stern v. Marshall's*] applicability to the matters at hand . . . [is] non-conclusory. . . . The saf[est] interpretation as to the limitations upon this court due to the effect of the *Stern* case is that this Court may only submit proposed findings of facts and conclusions of law regarding the state law claims against Defendant.¹²⁹

Although some bankruptcy judges disapprove of such a cautious approach,¹³⁰ other bankruptcy judges adhere to it, calling the approach the "most prudent and expedient course of action," and deeming it an attempt "to insulate the ultimate judgment from collateral attack given the

¹²⁴ Lewis et al., *supra* note 88, at 2.

¹²⁵ *Id.*

¹²⁶ Medical Educ. & Health Servs., Inc. v. Independent Mayaguez (*In re Med. Educ. & Health Servs., Inc.*), 459 B.R. 527 (Bankr. D.P.R. 2011).

¹²⁷ *Id.* at 534.

¹²⁸ *Id.* at 549.

¹²⁹ *Id.*

¹³⁰ *See, e.g.,* Meoli v. Huntington Nat'l Bank (*In re Teleservices Grp., Inc.*), 456 B.R. 318, 324 (Bankr. W.D. Mich. 2011) ("One alternative would be to play it safe and simply refer without reflection every future determination I make to a district judge for his or her final review. However, I do not see how I can do so in good faith given Authority Section 157(b)(3)'s direction that I must decide even in instances when not requested whether I have the ability or not under that section to enter a final order. Moreover, I suspect that the Article III judges in my district would not be pleased with the extra workload such an approach would impose upon them.") (internal citations omitted).

presently-confused state of the law.”¹³¹ Consequently, regardless of the approach taken, the trend is clear: bankruptcy judges are likely to proceed cautiously in the post-*Stern* era in determining whether they retain the authority to enter final orders on the matters before them.¹³² Of course, the degree of caution will vary from jurisdiction to jurisdiction.

3. *Jurisdiction by Consent*

Following *Stern v. Marshall*, practitioners initially were fearful that bankruptcy courts would be incapable of entering final judgments on non-core matters—even where the parties consented to jurisdiction.¹³³ As the Honorable Robert E. Gerber bemoaned:

[I]t may now be, and it’s fair to assume that it will now be argued, that consent, no matter how uncoerced and unequivocal, will never again be sufficient for bankruptcy judges . . . to issue final judgments on non-core matters [post-*Stern*]. That huge uncertainty presages litigation over that issue with the potential to tie up this case, and countless others, in knots. . . invit[ing] litigants to consent, see how they like the outcome, and then, if they lose, say their consents were invalid.¹³⁴

However, as Lewis, Steinberg-Barrage, Novak, and Kushner explain, these initial concerns were largely unfounded, and, to date, “bankruptcy jurisdiction by consent appears to remain alive and well.”¹³⁵ In fact, “[v]irtually every case discussing *Stern* that has addressed the issue of consent has concluded that, with respect to non-core, ‘related to’ proceedings . . . a bankruptcy court may issue [a] final judgment with the parties’ consent.”¹³⁶

For example, *Adams National Bank v. GB Herndon & Associates, Inc. (In re GB Herndon & Associates, Inc.)* involved co-defendants who breached a forbearance agreement with

¹³¹ Richardson v. BDSM Corp. (*In re Teyilo Indus., Inc.*), Bankr. No. 09–07311, Adv. No. 11–80300, 2011 WL 4793343, at *2 (Bankr. W.D. Mich. Aug. 30, 2011).

¹³² See Klein & Sussman, *supra* note 105.

¹³³ Lewis et al., *supra* note 88, at 3.

¹³⁴ *In re BearingPoint, Inc.*, 453 B.R. 486, 497 (Bankr. S.D.N.Y. 2011).

¹³⁵ Lewis et al., *supra* note 88, at 3.

¹³⁶ *Id.* Lewis, Steinberg-Barrage, Novak, and Kushner explain that “related to” proceedings are “proceedings that are not ‘core proceedings’ under 28 U.S.C. § 157(b)(1) but are ‘related to a case under’ the Bankruptcy Code.” *Id.*

a lender and, in answering the lender’s complaint, asserted various counterclaims.¹³⁷ In order to prevent the lender from foreclosing on and selling the collateral securing the note, the defendants filed for bankruptcy, thereby triggering the automatic stay provision of the Bankruptcy Code.¹³⁸ After the various claims and counterclaims had been removed to the bankruptcy court, the court dismissed the defendants’ counterclaims.¹³⁹ Invoking *Stern v. Marshall*, the debtor-defendants then filed a Motion for Relief from Judgment and to Alter or Amend Judgment, claiming that the bankruptcy court lacked the constitutional authority to resolve their counterclaims.¹⁴⁰ The court denied the defendants’ motion, concluding that the defendants had “undisputedly waived” their right to have their counterclaims adjudicated in an Article III court.¹⁴¹ The court explained:

[As in] *Schor*, it was [defendants’] choice to litigate in this court and it was only after the court entered judgment in favor of [the plaintiff] on the claim that [defendants] raised a challenge to this court’s authority. . . . If the [defendants] believed that the Bankruptcy Court lacked the authority to decide [their] claim . . . then [the defendants] should have said so—and said so promptly. [Defendants’] failure to do so constitutes a waiver of [the] right to an Article III adjudication.¹⁴²

The Honorable S. Martin Teel, Jr. thus concluded that bankruptcy courts may adjudicate non-core proceedings “without running afoul of Article III, when there has been consent by the parties.”¹⁴³ Numerous other bankruptcy courts have reached the same conclusion.¹⁴⁴ The Sixth and Ninth Circuits, however, have split on whether parties in bankruptcy court are able to

¹³⁷ *Adams Nat’l Bank v. GB Herndon and Assocs., Inc. (In re GB Herndon & Assocs., Inc.)*, 459 B.R. 148, 151–52 (Bankr. D.D.C. 2011).

¹³⁸ *Id.* at 152.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 153–54.

¹⁴¹ *Id.* at 157.

¹⁴² *Id.* at 157–58 (internal citations and quotation marks omitted).

¹⁴³ *Adams Nat’l Bank*, 459 B.R. at 162.

¹⁴⁴ *See, e.g., In re Safety Harbor Resort & Spa*, 456 B.R. 703, 705 (Bankr. M.D. Fla. 2011) (“[P]arties can still consent—either expressly or impliedly—to a bankruptcy court’s jurisdiction after *Stern*.”); *In re Olde Prairie Block Owner, LLC*, 457 B.R. 692, 699 (Bankr. N.D. Ill. 2011) (“Nonetheless, even if that ground were not available under *Stern* for entry of final judgment . . . a second ground exists: the parties consented to final judgment.”); *Pro-Pac, Inc. v. Chapes (In re Pro-Pac, Inc.)*, 456 B.R. 894, 902–03 (Bankr. E.D. Wis. 2011) (stating that “*Stern* confirms that the bankruptcy court has the authority to render final judgments even in non-core proceedings with the consent of the parties.”). *But see In re BearingPoint, Inc.*, 453 B.R. 486, 497 (Bankr. S.D.N.Y. 2011) (questioning whether consent can effectively confer jurisdiction upon the bankruptcy courts).

consent to final adjudication of non-core proceedings.¹⁴⁵ But a recent decision by the Fifth Circuit appears to tip the balance in favor of allowing final adjudication of non-core proceedings in bankruptcy court if the parties consent to adjudication therein.¹⁴⁶ Accordingly, given the treatment of consent by most of the bankruptcy courts and a majority of the appellate courts that have directly confronted the issue, jurisdiction by consent appears to be “alive and well” in the post-*Stern* era.¹⁴⁷

4. *Summarizing the Impact of Stern v. Marshall*

Commentators largely agree that the immediate impact of *Stern v. Marshall* will depend on how lower courts interpret the opinion.¹⁴⁸ Although the bankruptcy courts have just begun to grapple with the implications of *Stern*, certain trends clearly are emerging: bankruptcy courts tend to interpret *Stern* narrowly;¹⁴⁹ proceed cautiously, often requesting that the parties submit supplemental briefs before issuing orders;¹⁵⁰ and agree that parties are able to consent to bankruptcy court jurisdiction over the matter.¹⁵¹ It thus would appear that *Stern* may not be the “jurisdictional game changer” it was once feared to be.¹⁵²

Of course, the true meaning of *Stern* will depend on how the appellate courts interpret the decision.¹⁵³ But until then, how are bankruptcy judges—to borrow the language of the

¹⁴⁵ Compare *Executive Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency, Inc.*), 702 F.3d 553, 570 (9th Cir. 2012) (finding that litigants can consent to final adjudication of non-core proceedings in bankruptcy court), with *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012) (finding that parties cannot consent to final adjudication in bankruptcy court when that court lacks constitutional authority to decide the matter).

¹⁴⁶ See *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 404–07 (5th Cir. 2012) (analyzing the impact of *Stern* to determine whether federal magistrates retain authority to enter final judgments on state-law counterclaims when the parties consent to trial and entry of judgment by a federal magistrate judge, and concluding that they do).

¹⁴⁷ Lewis et al., *supra* note 88, at 3.

¹⁴⁸ Lewis et al., *supra* note 71, at 1.

¹⁴⁹ Lewis et al., *supra* note 88, at 1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Lewis et al., *supra* note 71, at 1.

¹⁵³ See Primoff & Kleinman, *supra* note 85, at 5 (explaining that the true implications of *Stern* will remain unknown “[u]ntil such time as there is binding precedent at the circuit court level to clarify the[] issues”).

Honorable Jeffery R. Hughes—to “recalibrate the core/non-core dichotomy so that [bankruptcy judges] can again proceed with at least some assurance that [they] will not be making the same constitutional blunder with respect to some other aspect of Authority Section 157(b)(2)?”¹⁵⁴ Likewise, how are bankruptcy practitioners to proceed with confidence that a judgment on a “non-core, related to” matter, entered in their favor, will be upheld on appeal? After all, the *Stern* opinion “seemingly invite[s] litigants to consent, see how they like the outcome, and then, if they lose, say their consents were invalid.”¹⁵⁵

IV. The Multi-Step Inquiry

Recognizing the above shortcomings, this section offers a multi-step inquiry to aid bankruptcy judges and practitioners in determining whether a non-core matter is capable of being determined in a non-Article III tribunal:

Bankruptcy judges and practitioners should begin by making a two-part inquiry: First, is the asserted claim “related to a case” arising under the Code? Second, have the parties consented to adjudication in bankruptcy court? If both questions are answered affirmatively, the bankruptcy court likely has authority to enter final judgment on the matter, as virtually every court that has addressed the issue of consent post-*Stern* has found that, “with respect to non-core, ‘related to’ proceedings,” bankruptcy courts can issue final judgment on the matter as long as the parties have expressly or impliedly given their consent.¹⁵⁶ Accordingly, when confronted with

¹⁵⁴ *Meoli v. Huntington Nat’l Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011).

¹⁵⁵ *In re BearingPoint, Inc.*, 453 B.R. 486, 497 (Bankr. S.D.N.Y. 2011).

¹⁵⁶ *See Lewis et al., supra* note 88, at 3; *see also* *Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 570 (9th Cir. 2012); *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 705 (Bankr. M.D. Fla. 2011) (“[P]arties can still consent—either expressly or impliedly—to a bankruptcy court’s jurisdiction after *Stern*.”); *In re Olde Prairie Block Owner, LLC*, 457 B.R. 692, 699 (Bankr. N.D. Ill. 2011) (“Nonetheless, even if that ground were not available under *Stern* for entry of final judgment . . . a second ground exists: the parties consented to final judgment.”). *But see* *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012) (explaining that consent is ineffectual because the limitation is a structural principle imposed by Article III of the Constitution); *In re BearingPoint, Inc.*, 453 B.R. at 497 (speculating that “it may now be, and it’s fair to assume that it will now be

non-core, “related to” proceedings, the most prudent course of conduct post-*Stern* is for bankruptcy judges and practitioners to obtain the written consent of (as a judge) both parties or (as a practitioner) the adverse party during the early stages of litigation.

Assuming the parties’ consent is unclear or has not been given, the bankruptcy judge or practitioner should engage in another two-part inquiry: First, is the asserted claim founded on state law?¹⁵⁷ If so, can the claim nonetheless be resolved in the process of ruling on a core proceeding?¹⁵⁸ If the initial question is answered in the affirmative, the asserted claim is likely a matter of private right that cannot be determined in a non-Article III tribunal absent the express or implied consent of the parties.¹⁵⁹ In determining whether a claim is a matter of private right, the bankruptcy judge or practitioner should look to the “fundamental basis of recovery.”¹⁶⁰ For example:

[I]f a debtor in bankruptcy sues a counterparty . . . for improperly calculating the amount due on a[n] . . . agreement terminated on account of bankruptcy, the [debtor]-plaintiff’s right to recover . . . is founded on a contract, and it is therefore a matter of private right – even if the dispute implicates a host of question about . . . *ipso facto* clause[s] and whether the bankruptcy safe harbors do or do not apply.¹⁶¹

Because the debtor’s “fundamental basis of recovery” (at least in the above example) rests on a state law contract claim, the simple fact that the claim presents a question—or perhaps questions—of federal bankruptcy law will not convert the claim into a “matter of public right,” any more than the presence of a state law issue in a proof of claim would convert that proof of claim into a matter of private right.¹⁶²

argued, that consent . . . will never again be sufficient for bankruptcy judges . . . to issue final judgments on non-core matters [post-*Stern*].”)

¹⁵⁷ Goldblatt, *supra* note 49, at 3.

¹⁵⁸ *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011).

¹⁵⁹ Goldblatt, *supra* note 49, at 3.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 4.

¹⁶² *Id.*

However, even if the initial inquiry is answered in the affirmative, bankruptcy courts may nonetheless have the authority to enter final judgment on the matter if the state law claim can be resolved in the process of ruling on a core bankruptcy proceeding—which takes us to the second inquiry to be made by the bankruptcy judge or practitioner. This qualifier is taken directly from language in *Stern v. Marshall*. Therein, Chief Justice Roberts concluded:

The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim *that is not resolved in the process of ruling on a creditor's proof of claim*. Accordingly, the judgment of the Court of Appeals [dismissing the action] is affirmed.¹⁶³

Such language implies that even when a claim is a matter of state law (i.e., a matter of private right), the bankruptcy court has the authority to enter final judgment on the matter if the state law claim must be “resolved in the process of ruling on” a core bankruptcy proceeding—for example, a creditor’s proof of claim.¹⁶⁴

Thus, to summarize, in determining whether a matter is capable of being resolved in a bankruptcy tribunal, the judge or practitioner should determine: (1) whether the proceeding is “related to a case” arising under the Bankruptcy Code; and (2) whether the parties are voluntarily in (i.e., have consented to) bankruptcy court. If both questions are answered in the affirmative, the bankruptcy court likely has the authority to enter final judgment on the matter.¹⁶⁵ If, for whatever reason, consent is unclear or has not been given, the bankruptcy judge or practitioner should ask: (1) whether the matter is founded on state law—that is, whether the “fundamental

¹⁶³ *Stern*, 131 S. Ct. at 2620.

¹⁶⁴ In fact, this was the reasoning employed by the Sixth Circuit in *Onkyo Europe Electronics GMBH v. Global Technovations Inc.* (*In re Global Technovations Inc.*), 694 F.3d 705, 722 (6th Cir. 2012). In *Onkyo*, the Sixth Circuit held that the bankruptcy court could rule on the defendant’s fraudulent transfer claim, even though the claim was a matter of state law, “because ‘it was not possible . . . to rule on [Onkyo’s] proof of claim without first resolving’ the fraudulent-transfer issue.” *Id.* (citing *Stern*, 131 S. Ct. at 2616). Accordingly, the Sixth Circuit held that it was “crystal clear that the bankruptcy court had the constitutional authority under *Stern* to adjudicate” the claim. *Id.*

¹⁶⁵ See sources cited *supra* note 156; see also *Executive Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency, Inc.*), 702 F.3d 553, 570 (9th Cir. 2012); *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 404–07 (5th Cir. 2012).

basis of recovery” is state law; and (2) if so, whether the matter must nonetheless be resolved in the process of ruling on a related core proceeding. If both questions are answered in the affirmative, the bankruptcy court likely has the authority to enter final judgment on the matter.

V. Conclusion

In the wake of *Stern v. Marshall*, there is nebulous uncertainty regarding its import. Nevertheless, an assessment of bankruptcy court opinions suggests that courts generally are interpreting *Stern* narrowly. This finding is unsurprising; it reflects “the bankruptcy courts’ natural desire to preserve their authority and their deference to constitutional constraints.”¹⁶⁶

Of course, the true impact of *Stern* will largely depend on how the appellate courts interpret the opinion.¹⁶⁷ Although the appellate courts have begun to enter the fray, it is still too early to ascertain any clear trends from these opinions. In fact, because only the Sixth and Ninth Circuits have squarely confronted one of the questions left unresolved in *Stern*, and because those courts are divided in their resolution of the issue—the significance of consent—the appellate courts have only further muddied the import of *Stern*. Still, unless the appellate courts interpret *Stern* in a manner markedly different from the bankruptcy courts, *Stern* likely will remain a narrow ruling rather than a “jurisdictional game changer.”¹⁶⁸ Until the uncertainty is resolved, however, bankruptcy judges and practitioners should err on the side of caution by employing the aforementioned analysis to determine whether bankruptcy courts have the authority to enter final judgment on matters in the post-*Stern* era.

¹⁶⁶ Lewis et al., *supra* note 88, at 1.

¹⁶⁷ See Primoff & Kleinman, *supra* note 85, at 5 (explaining that the true implications of *Stern* will remain unknown “[u]ntil such time as there is binding precedent at the circuit court level to clarify the[] issues”).

¹⁶⁸ Lewis et al., *supra* note 71, at 1.